

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | | |
|-------------------------------------|---|----------------------|
| IN THE MATTER OF |) | |
| CONNECT AMERICA FUND |) | WC Docket No. 10-90 |
| A NATIONAL BROADBAND PLAN FOR OUR |) | GN Docket No. 09-51 |
| FUTURE |) | WC Docket No. 05-337 |
| HIGH-COST UNIVERSAL SERVICE SUPPORT |) | |

**REPLY COMMENTS
OF THE
MONTANA INTER-TRIBAL TELECOMMUNICATIONS CONSORTIUM (MITTC) &
NATIVE AMERICAN DEVELOPMENT CORPORATION (NADC)
REGARDING NOTICE OF PROPOSED RULEMAKING**

On April 21, 2010, the Federal Communications Commission (“Commission”) issued a notice of inquiry and notice of proposed rulemaking seeking comments on reforms for the Universal Service Fund (“USF”) proposed by the Commission in the *Connecting America: The National Broadband Plan* (“National Broadband Plan”). *Notice of Inquiry and Notice of Proposed Rulemaking, In re Connect America Fund, A National Broadband Plan for Our Future, High-Cost Universal Service Support*, WC Dkt. Nos. 10-90, 05-337, GN Dkt. No. 09-51, FCC 10-58 (Apr. 21, 2010) (“NOI and NPRM”). The Commission specifically asked for the views of Indian tribes.

The Montana Inter-Tribal Telecommunications Consortium (MITTC) is a consortium of all seven Tribes in Montana that was created to help bring more interconnectivity to Montana’s Indian reservations. In concert with the Native American Development Corporation (NADC), MITTC applied for ARRA broadband funds. Jointly we represent the view of many of the Tribes that do not yet have Tribal telecommunications companies but are striving to reach that goal. And collectively we have grave concerns with the NOI and NPRM. USF was created to make sure those with the least access were connected. Indians are those with the least access.

**BACKGROUND OF MONTANA INTER-TRIBAL TELECOMMUNICATION CONSORTIUM (MITTC)
AND NATIVE AMERICAN DEVELOPMENT CORPORATION (NADC)**

The Montana Inter-Tribal Telecommunication Consortium (MITTC) is a partnership between the Native American Development Corporation (NADC) and the tribal governments of Montana's seven reservations to develop middle mile fiber optic network connecting the Blackfeet, Crow, Flathead-Salish and Kootenai, Fort Peck, Fort Belknap, Northern Cheyenne and Rocky Boys Reservations.

The seven federally-recognized Indian Tribes in Montana have joined NADC, a recognized regional Native American economic development institution, to develop telecommunications infrastructure in Indian Country in Montana.

Most immediately MITTC and NADC have applied for American Reinvestment and Recovery Act (ARRA) broadband funds with the Department of Commerce's National Telecommunications Information Administration (NTIA). Our broadband project would provide middle mile high-speed broadband connectivity to the unserved and underserved reservation communities of Montana which have long been economically and geographically isolated. It would create a 1,300 mile, 96 fiber, next generation 100% IP based loop through much of Montana to pull together the five Tribes in central/northern Montana, with an additional southern spur to cover the two Tribes in the more southern parts of Montana.

The development of broadband infrastructure on Montana's Indian reservations has been impacted by the high cost of construction in this challenging terrain and the low population density, and misplaced federal subsidies, particularly with USDA, which continue to institutionalize the current poor service patterns discussed further below and has resulted in a middle mile hole that is immediately evident on any national broadband map.

The Tribes in Montana are hopeful that their ARRA application will be successful and the way may be paved for the creation of new Tribal telecommunications companies in Montana and dramatically increased services and subscribership. The odds were difficult enough previously, but the Commission's new proposals for USF and ETC funding severely threatens the prospects on the Native American Tribal communities receiving increased telecommunications connectivity and for the Montana Tribal governments to provide those services to their own nation.

USF WAS CREATED TO ENSURE THOSE WITH THE LEAST ACCESS WERE CONNECTED – INDIAN COUNTRY HAS THE LEAST ACCESS

Telephone Subscribership 30 Points Lower In Indian Country. In the 2000 census, national phone coverage was 98%, while it was only 69% on tribal lands.¹ That is a full 30 points lower than the national average. The Commission itself has recognized “that Native American communities have the lowest reported level of telephone subscribership in America” (Sacred Winds Communications Inc. Order, DA 06-1645).

Not only is that a travesty for day to day communications and hope for economic development for Native people, it is an enormous safety issue. Indian Country is some of the most rural and isolated land in America with some of the harshest conditions, blizzards, flash flooding, ice storms, and tornadoes. No phones means no 911, no way to call for help and it has often lead to fatal results for our communities.

- Phone coverage is 98% nationwide
- Phone coverage is 69% on tribal lands
- Phone coverage is as low as 34% on many reservations like the Navajo Nation

¹ *Challenges to Assessing and Improving Telecommunications for Native Americans on Native lands*, United States Government Accountability Office, Report to Congressional Requesters, Telecommunications, January 2006, GAO-06-189, p. 11 (“GAO Report”).

- Nearly 1/3 of Native Americans lack the ability to call 911

Broadband Subscribership may be 40 Points Lower in Indian Country. According to the General Accountability Office (“GAO”) “[t]he status of Internet subscribership on Native lands is *unknown* because no federal survey has been designed to track this information.”² There are no accurate figures, but many Indian Country telecom experts estimate that less than 10% of the Native population has high speed broadband access. In contrast, as of December 2006, the Commission reported that more than 50% of U.S. households subscribed to broadband speed Internet services.³

- 50% of all U.S. households have high speed access
- Maybe less than 10% of Native Americans in the US have high speed access

Cell Service is Difficult if Not Impossible in Indian Country. As the National Tribal Telecommunications Association (NTTA) recently noted in comments filed with the Commission, there is very little reliable data regarding provisioning of wireless services on Native lands.⁴ However, for most of our Nations as soon as you drive on to most reservations you lose cell service and as soon as you drive off cell service is returned. With or without formal data, there is no doubt that our communities do not receive the same level of wireless service as the rest of the U.S.

Additional Variables of Importance to Consider. In addition to the data on the lack of telecommunications in Indian Country the rest of our infrastructure still struggles as well. This data is important for the Commission to take into consideration, as it is not simply a lack of telecommunications in Indian Country. We are not simply rural communities that need a little more

² *Challenges to Assessing and Improving Telecommunications for Native Americans on Native lands*, United States Government Accountability Office, Report to Congressional Requesters, Telecommunications, January 2006, GAO-06-189, p. 11 (“GAO Report”).

³ *Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, Recommended Decision, FCC 07J-4, WC Docket No. 05-337, CC Docket No. 96-45 (rel. Nov. 20, 2007), para. 59 (“Joint Board Recommended Decision”).

⁴ *Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Comments of the National Tribal Telecommunications Association, WT Docket No. 08-27, and WT Docket No. 07-71 (filed Mar. 26, 2008).

connectivity, we are often deeply impoverished communities without even basic infrastructure and we need substantial and focused federal assistance.

- **Poorest Communities in America.** Seven (7) of the ten (10) poorest counties in America are on or within Indian Reservations.
- **70%+ Unemployment.** The actual unemployment rate on many of our reservations is 70-80%
- **14% of Indian Country Has No Electricity.** Many of our communities do not even have basic infrastructure that could lead to telecommunication services. For example, 14% of Indian Country does not even have access to electricity. This third world condition is offensive when compared to the 98.6% of the rest of America that has electricity.⁵
- **80% of Native Communities located in Price Cap Service Areas.**⁶

THE PROVEN SOLUTION – TRIBAL SELF-DETERMINATION – TRIBALLY OWNED PROVIDERS

While the current picture of economic resources and telecommunications infrastructure is bleak in Indian Country, there are proven solutions, Tribally-owned telecommunications companies.

The current system has not worked for Indian people and Indian lands. One only need to look at the statistics cited above for proof. Whatever reasons given by either the federal government of the current providers, the system is not working to empower our people and provide connectivity. USF was created to make sure those with the least access were connected. Indians are those with the least access.

⁵ Energy Information Administration, *Energy Use and Renewable Energy Development Potential on Indian Lands*, 2000

⁶ Comments of the National Tribal Telecommunications Association, FINISH page 9.

One can imagine with all of the financial, political and federal impediments this path would not be chosen if all the other options were not already exhausted. It has been a difficult and expensive path for the current eight Tribal providers, and not a path that was taken lightly.

But the proof is irrefutable, in our nations where Tribal telecommunications companies have been created, the penetration rates increase exponentially. The National Tribal Telecommunications Association (NTTA), the organization which represents our sister Tribes which have already created their Tribal telecommunications companies stated this proof clearly in their recent comments on USF reform:

“In 1990, 6 of the 8 Tribes that became their own regulated service providers **had less than 10 percent service penetration in** their communities. At the time of their decision to become regulated services, these 8 Native tribes felt they had no choice but to provision the communications needs of their communities. **Today, each of these communities has seen 300 to 800 percent increases in service penetration** accompanied by similar broadband access increases.”⁷ (*emphasis added*)

We have not heard of any other company, policy, program or incentive that has that substantial of an impact for connectivity for our Nations. This is our path to economic development and self-determination. We as governments have a different incentive for ensuring that all within our Nations are connected.

⁷ Comments of the National Tribal Telecommunications Association (NTTA) to WC Dkt. Nos. 10-90, 05-337, GN Dkt. No. 09-51, FCC 10-58 Filed July 12, 2010, Page 6.

NEAR IMPOSSIBLE TO CREATE TRIBAL TELECOMMUNICATION COMPANIES UNDER CURRENT FEDERAL BARRIERS – USF/ETC CHANGES WOULD COMPOUND THIS PROBLEM

While Indian Country knows the solution, asserting self-determination over the telecommunications services being provided on our lands and creating our own Tribal providers, the barriers remain enormous, including federal impediments.

The development of broadband infrastructure on Montana's Indian reservations has been impacted by the high cost of construction in this challenging terrain and the low population density, and misplaced federal subsidies, particularly with USDA, which continue to institutionalize the current poor service patterns and has resulted in a middle mile hole in Montana's Indian Country that is immediately evident on any national broadband map.

Tribal governments have different incentives for ensuring their nation is connected than other providers. We are committed to making sure that each of our citizens has the same access as the rest of America, and our nations have a fair chance at economic development.

With the inherent economic difficulties of servicing rural and isolated communities one of the few financing opportunities to begin a rural or tribal telecommunications providers is through the low interest loans available through the United States Department of Agriculture's Office of Rural Utilities Services (RUS).

Unfortunately RUS has a built in preference for incumbent providers (Title II Providers). What this means is that if there is a pre-existing RUS borrower that claims to be providing sufficient services on Tribal lands, even if they are not, the Tribe is ineligible. Most rural areas already have a rural provider, and almost all rural providers are RUS borrowers. This is an enormous problem for the Tribes in Montana as **every Tribe in Montana is ineligible for RUS telecommunications and broadband loans.**

**CHART 1: TRIBES IN THE ROCKY MOUNTAIN AND GREAT PLAINS REGION THAT ARE
INELIGIBLE FOR RUS TELEPHONE AND BROADBAND LOANS
BECAUSE OF THE INCUMBENT (TITLE II) PREFERENCE**

| STATE/TRIBES | EXISTING USDA-RUS TITLE II BORROWER |
|---------------------|--|
| Montana | |
| Blackfeet | X |
| Crow | X |
| Flathead | X |
| Fort Belknap | X |
| Fort Peck | X |
| Northern Cheyenne | X |
| Rocky Boy | X |
| Wyoming | |
| Wind River | X |
| Nebraska | |
| Omaha | X |
| Ponca | - |
| Santee | X |
| Winnebago | X |
| North Dakota | |
| Three Affiliated | X |
| Spirit Lake | - |
| Standing Rock | X |
| Turtle Mountain | X |
| South Dakota | |
| Cheyenne River | X |
| Crow Creek | X |
| Flandreau | - |
| Lower Brule | - |
| Pine Ridge | X |
| Rosebud | X |
| Sisseton | X |
| Standing Rock | X |
| Yankton | - |

The RUS loans are an important source of start up funding for most rural providers, and most Tribes are ineligible. If Indian Country was being properly serviced by the current providers, then we wouldn't have the poorest access rates. The southwest area does not have the same level of

penetration with rural RUS funded providers. As such you can see this institutionalized impediment clearly outlined below. **Of the eight (8) regulated tribal telephone companies, only one (1) is outside the southwest.** There is not a single regulated tribal telephone company in Montana or the Rocky Mountain Region.

CHART 2: CURRENT REGULATED TRIBAL TELEPHONE COMPANIES

| <u>TRIBAL TELECOM</u> | <u>STATE</u> |
|---|----------------------------------|
| Cheyenne River Telephone Authority | South Dakota |
| Fort Mojave Telecommunications | Arizona (California & Nevada) |
| Gila River Telecommunications | Arizona |
| Hopi Telecommunications | Arizona |
| Mescalero Apache Telecom, Inc. | New Mexico |
| Saddleback Communications (Salt River Pima-Maricopa) | Arizona |
| San Carlos Telecommunications | Arizona |
| Tohono O'Odham Telecommunications | Arizona |

Once the RUS title II preferences were addressed for Tribal applicants in Round 2 of the economic stimulus funds, 21 Tribes and 2 coalitions of multiple Tribes applied for the funds. Combined with the Department of Commerce applications, over 50 Tribes applied for ARRA broadband funds in Round 2 alone, including all seven (7) Tribes in Montana jointly as well as several of our Tribes individually. The reason there are only eight (8) Tribal providers right now is because of barriers, not because of lack of need, interest, or commitment.

“REVERSE AUCTION” WILL LIKELY RESULT IN SAME “INCUMBENCY” PREFERENCE PROBLEM AT USDA – AND WILL SHUT TRIBES OUT

Once a rural (or tribal) telephone company has been created (most through access to USDA-RUS loans) most are dependent upon ETC status and USF programs and funds to maintain operations.

A single winner reverse auction is most likely to favor incumbent providers, which will create the same system the RUS is struggling with now. The Tribes who want to create and maintain new Tribal providers to service their own nations will not be able to. Additionally this proposal has the result of incentivizing the cheapest service rather than the service that best serves our Nations.

TRIBES ARE SOVEREIGN NATIONS WITH JURISDICTION OVER THEIR OWN TERRITORIES – THE COMMISSION SHOULD NOT BE SUBSIDIZING EXTERNAL ENTITIES OVER TRIBAL LANDS WITHOUT TRIBAL CONSENT

The Commission's own *Indian Policy Statement* clearly recognizes that "Indian Tribes exercise inherent sovereign powers over their members and territory."⁸ The statement goes further to elaborate on the importance of working directly with Tribes on any Commission policies, and ensuring that they "empower tribal independence" not institutionalize preferences for non-Tribal providers:

We are mindful that the federal trust doctrine imposes on federal agencies a fiduciary duty to conduct their authority in matters affecting Indian tribes in a manner that protects the interest of the tribes. We are also mindful that federal rules and policies should therefore be interpreted in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence.⁹

There are many instances in which the current non-Tribal providers have excellent relationships with and provide very good services to Tribal communities. But in the end, it is the Tribe's decision what providers are on their lands. We hope we do not see that same issue

⁸ *FCC Statement of Policy Establishing a Government-to-Government Relationship with Indian Tribes*. Pg 3, III. Reaffirmation Of Principles Of Tribal Sovereignty And The Federal Trust Responsibility. (June 23, 2000) ("*Indian Policy Statement*") (emphasis added)

⁹ *Twelfth Report and Order*, FCC Rcd 12208 at Para. 119

experienced at RUS become ingrained in the FCC as well, where the FCC caps a selection system which essentially permanently subsidizes incumbents without regard to tribal input.

RECOMMENDATIONS

- **The Commission Needs to Hold A Consultation with Tribes on these Proposed Changes**
 - To the best of our knowledge no Tribal consultations have occurred on this NPRM. The Commission should reach out to the current Tribal provider with NITTA, and to all of us future Tribal providers as well.
- **Tribes And Tribal Lands Should Be Exempt From Any Caps**
 - Current providers are usually not servicing our whole reservation. Even if a new Tribal provider were to obtain ETC status, if they are capped at their predecessor's levels, it will more often be at levels that are not reflective of servicing our entire communities.
 - If a distinct Tribal Program is created, it should not be a stand-alone program with a separate line item or separate source of funding. It is our unfortunate experience that anytime an Indian specific program gets carved out, and therefore does not benefit from the advocacy efforts of a larger population, it ceases to get funding.
- **Tribes Should Have Self-Determination Over Their Own Lands, And Have the Option to Chose their ETC Providers**
 - There is no "one-size-fits-all" in Indian Country.
 - We have eight tribes that are the incumbents, we have dozens of tribes that are trying to create tribal providers, we have all different forms of technology and services

being contemplated, we have some tribes with good relationship with incumbents, and others that are not being served.

- The important point being that each Tribe is different and each Tribe should be able to decide what is best for their nation.
- Tribes should determine what and who gets the ETC status for servicing their lands.
- All Commission proceedings should indicate if they affect Tribal lands, and those Tribes should be notified.
- **The Commission Should Include Tribal Governments in All Boards and Decisions.**
 - The Commission has “State” board policy deliberations and no Tribal Government inclusion.
 - It is not acceptable to defer to states for distribution of federal resources or federal policy decisions over sovereign Tribal lands.
 - The Commission should directly distribute funds to the Tribes in consultation with the Tribes.
- **Commission Study Area Boundaries Should Respect And Mirror Tribal Boundaries**
 - The current FCC boundaries and wire centers were created without our Nations in mind, they do not mirror our nations boundaries and jurisdictions. Without redesigning these boundaries the Commission is violating its nation-to-nation relationship with the Tribes and undercutting Tribal sovereignty in violation of the Commission *Indian Policy* by forcing the Tribes to service outside their jurisdiction in order to service their whole nation.

Dated this 11th of August 2010.

_____[electronically filed]_____
Respectfully submitted,
Heather Dawn Thompson
Sonnenschein, Nath & Rosenthal, LLP
1301 K Street, NW
Suite 600, East Tower
Washington, D.C. 20005
(202) 408-6400
(202) 408-6399 (Fax)
hthompson@sonnenschein.com

Attorney for Native American Development Corporation